

NO. 33347

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. WEST VIRGINIA REGIONAL
JAIL AND CORRECTIONAL FACILITY AUTHORITY,

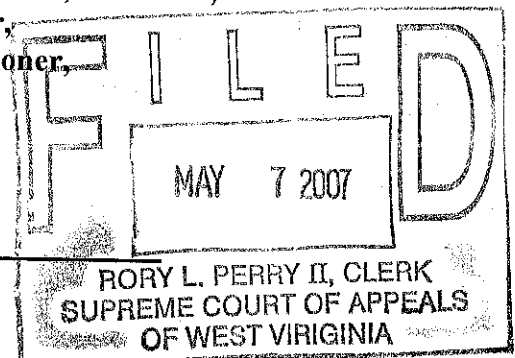
Appellant,

vs.

CABELL COUNTY COMMISSION, BOB BAILEY, President,
W. SCOTT BIAS, Commissioner,
and NANCY CARTMILL, Commissioner,

Appellees.

BRIEF OF APPELLANT



Appeal From Final Order
Entered May 15, 2006
Case No. 05-C-0590
Circuit Court of Cabell County, West Virginia

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BOB BAILEY, as President,
W. SCOTT BIAS, as Commissioner,
and NANCY CARTMILL, as Commissioner,

Appellees.

BRIEF OF APPELLANT

Now Comes the Appellant, West Virginia Regional Jail and Correctional Facility Authority ("Regional Jail Authority"), pursuant to the Order of this Court dated April 4, 2007, and files the following Brief in Support of Appeal:

The matter before this Court is a direct result of the Regional Jail Authority's attempts, pursuant to *W. Va. Code* § 31-20-5 (2006), to compel the Cabell County Commission to fulfill its obligation to pay for the care and upkeep of those persons incarcerated or jailed in the West Virginia Regional Jail System at the express direction of the authorities of Cabell County, West Virginia.

I. NATURE OF THE PROCEEDING AND RULING BELOW

This case involves the Cabell County Commission's refusal to pay, or make arrangements to pay, the jail bill for detainees and inmates committed to the West Virginia Regional Jail system by the Circuit and Magistrate Courts sitting in Cabell County, West

Virginia. As of this writing, Cabell County has an outstanding jail bill in the approximate amount of \$1,733,484.02.¹

The instant matter was initially filed in this Honorable Court as a proceeding in original jurisdiction. The Regional Jail Authority initiated this action as a Petition for Writ of Mandamus pursuant to the express authority found in *W. Va. Code* § 31-20-5. Record, at p. 001 (hereinafter referred to as "R. XX"). By Order entered July 5, 2005, this Court issued a rule returnable before the Circuit Court of Cabell County, West Virginia for further proceedings to determine the issues presented. R. 013.

The Circuit Court of Cabell County, West Virginia (David M. Pancake, J., presiding) subsequently docketed this matter and entered a scheduling order for discovery, motions and briefing. R. 119. The parties conducted discovery and each side filed Motions for Summary Judgment. R. 147 - 664. Per Order of the circuit court, the parties then submitted proposed findings of fact and conclusions of law and objections to the proposed findings and conclusions. R. 667 - 812. The circuit court heard oral arguments on the cross-motions for summary judgment on January 26, 2006. After some correspondence between the circuit court and the parties, additional issues were identified and briefed by the parties. R. 829 - 1171. The parties filed Stipulations with the circuit court. R. 1172 - 1211. The parties then appeared before the circuit court for additional oral arguments on April 20, 2006, with the proceedings being transcribed for the record. R. 1215.

¹ As of the filing of the Petition for Writ of Mandamus on June 15, 2005, the Cabell County Commission was in arrears in the approximate amount of \$1,544,670.50. As of March 31, 2007, the Cabell County Commission owes approximately \$1,733,484.02. Of this amount, \$141,765.00 still represents the amount due and owing for fiscal year 2005. In addition, the Cabell County Commission still disputes approximately \$992,640.54 for fiscal year 2006 and \$599,078.48 thus far for fiscal year 2007. These amounts include pretrial inmates and convicted misdemeanants. Inmates sentenced to the custody of the Commissioner of Corrections are billed to the Division of Corrections. See, *W. Va. Code* § 31-20-10a(e) (2006).

By Final Order entered May 15, 2006, the Circuit Court of Cabell County, West Virginia issued findings of fact and conclusions of law with respect to the petition filed by the Regional Jail Authority. R. 1216. Although the circuit court initially noted that this Honorable Court had "issued a rule in mandamus returnable this Court," Final Order, Findings of Fact #1, at p. 1, R. 1216, the circuit court did not use the language of mandamus in the ultimate ruling. After completing the conclusions of law, the circuit court issued the following ruling:

WHEREFORE, for the reasons herein set forth, the Court is of the opinion to grant, in part, and deny, in part, the cross-motions for summary judgment; to order that the Commission is liable to the Jail Authority for per diem charges as adjusted in accordance to the foregoing findings of fact and conclusions of law; to order that each side is to bear its own costs; and to order that this case be dismissed from the Docket of this Court.

Final Order, at p. 13. R. 1228.

Nevertheless, the circuit court, in its conclusions of law, did make a negative reference to the requested mandamus relief. After quoting several decisions of this Court regarding the remedy of mandamus in relation to budgetary decisions, the circuit court concluded that **"in the absence of arbitrary action, this Court lacks authority to order the Commission to exercise its budgetary powers in any particular manner."** Final Order, Conclusion of Law 30, at p. 11. R. 1226. The circuit court then referenced its prior decision in the case of *Chiles v. Bailey*, Civil Action No. 05-C-162 and concluded that "this Court is without jurisdiction, under W. Va. Const. art. VI, § 1, to order the Respondent Commission to exercise its budgetary authority in any manner, but is authorized only to prevent it from exercising such budgetary authority in an unreasonable and arbitrary manner." Final Order, Conclusion of Law 33, at pp. 12-13. R. 1227 - 1228. (Citations omitted).

The circuit court noted that the Cabell County Commission is responsible for the per diem cost of "inmates incarcerated in regional jails where such inmates are incarcerated pursuant

to an order of a circuit court or magistrate court.” Final Order, Conclusion of Law 28, at p. 10.

R. 1225. However, the circuit court, again “reaffirming” its prior ruling in *Chiles v. Bailey*, Civil Action No. 05-C-162, concluded that the Cabell County Commission must fund its obligations under a formula of cascading priorities. The circuit court concluded that:

[U]nder circumstances where a county has exhausted its constitutional and statutory revenue sources, but has insufficient funds to finance all of its constitutional, statutory, and contractual obligations, a county must first fully fund all of its constitutional obligations and, thereafter, if additional funds remain, fund so much of its statutory obligations as possible and, thereafter, if additional funds remain, fund so much of its contractual obligations as possible.

Final Order, Conclusion of Law 32, at p. 12. R. 1227.

Within the thirteen (13) pages of the Final Order, the Circuit Court of Cabell County, West Virginia made several findings and conclusions that impacted the ability of the Regional Jail Authority to collect the amounts due from Cabell County, West Virginia. The following findings and conclusions that can be characterized as “adjustments” to the amount owed by Cabell County to the West Virginia Regional Jail and Correctional Facility Authority:

6. The Court concludes that the Jail Authority lacked a quorum at its meeting on February 10, 2004; that the Jail Authority’s action in increasing the per diem from \$45.00 to \$48.50 is void; and that the Jail Authority must reduce the amount allegedly owed by the Commission from and after July 1, 2004, by \$3.50 for every inmate day charged to the Commission.

17. The Court concludes that, pursuant to statute, a county is responsible only for the actual operational costs per inmate day at the regional jail for which charges are being assessed.

18. The Court concludes that the Jail Authority must reduce the amount allegedly owed by the Commission from and after July 1, 2004, to \$40.42, the amount stipulated by the parties to be the actual operational cost per inmate day for the Western Regional Jail for fiscal year 2005, for every inmate day charged to the Commission from and after July 1, 2004.

Final Order, Conclusions of Law 6, 17 and 18, at pp. 4 and 8. R. 1219 and 1223.

The instant matter involves an urgent question of public policy. The West Virginia Regional Jail system exists for the public safety of the citizens of West Virginia. However, the

system is only viable when all of the interested parties fulfill their obligations. The failure of even one county, especially one as large as Cabell, to pay for the care and upkeep of its inmates can only result in either unacceptably higher levels of cost, lower levels of service, or the eventual collapse of a well thought out cost efficient system.

If left unchecked by this Court, the net effect of the Final Order will be to strip the Regional Jail Authority of the certain remedy provided by the West Virginia Legislature for collection of payments from the various counties in West Virginia. In addition, if the Final Order of the Circuit Court of Cabell County, West Virginia is upheld, the system will become unmanageable.

The Regional Jail Authority is already experiencing the first wave of impact from the circuit court's ruling. As of the writing of this Brief, seven (7) counties, including Cabell County, have unilaterally reduced the *per diem* rate that they will pay the Regional Jail Authority. Based upon written notification to the Regional Jail Authority, each such county is referencing the May 15, 2006 Final Order of the Cabell County Circuit Court as support for their decision. Lincoln County and Mingo County have cited Conclusion of Law 6 (R. 1219) and are refusing to pay more than the former *per diem* rate of \$45.00 per day. The other five (5) counties, including Cabell County, have referenced Conclusions of Law 17 and 18 (R. 1223) in rejecting the Regional Jail Authority's *per diem* rate structure. Cabell County is still paying only \$40.42 per inmate day, even though the circuit court's ruling in this regard (Conclusion of Law 18, R. 1223) was specific to the direct expense numbers from fiscal year 2005. Harrison County and Taylor County are paying \$41.26 per inmate day. Wayne County is paying only \$43.50 per inmate day. Fayette County stopped paying any amounts to the Regional Jail Authority as of June of 2006. For these reasons, as well as those identified in the following discussion, the

judgment of this Court seriously threatens the viability of the unique statewide jail system in West Virginia.

II. STATEMENT OF THE CASE

By the late 1980's nearly every county jail in this state was plagued by extreme age, and deplorable conditions. A survey conducted in the summer of 1989 revealed that 65% of the county jails were more than forty (40) years old, 44% were over sixty (60) years old, and 23% were over eighty (80) years old. More than 50% of the counties were operating under either the terms of a court order or were actively engaged in a court action over conditions. In fact, the United States District Court for the Southern District of West Virginia, pursuant to an order entered by the late Judge Charles H. Haden III placed the Cabell County jail facility into Federal Receivership in June of 1981. See, Stipulations, ¶ 3. R. 1172.

This Court recognized the problem with aging jails and prison facilities. In the case of *Crain v. Bordenkircher*, 180 W. Va. 246, 376 S.E.2d 140 (1988), this Court ordered the closing of the West Virginia Penitentiary in Moundsville. This Court also directed the Executive and Legislative branches to study and develop a plan to replace the State Penitentiary and alleviate the problems identified in the local jails and correctional facilities.

The West Virginia Legislature recognized that these problems were untenable as noted in the specific findings of *W. Va. Code 31-20-1a*:

(a) The Legislature finds as follows: (1) That some existing jails, adult correctional facilities and juvenile detention and correctional facilities in this state serve neither the best interests of the incarcerated populations of the jails and facilities nor the citizens of West Virginia.

W. Va. Code § 31-20-1a (2006).

The modernization of an aging and obsolete jail system was a daunting task for even the most prosperous county. In 1982, under the auspices of the Governor's Committee on Crime,

Delinquency and Corrections, a special study called for the establishment of a regional jail system to address the problems associated with the operation of individual county jails.

In 1985, the West Virginia Legislature embraced a unique approach to aid the counties and political subdivisions in meeting the constitutional requirements for jail and correctional facilities. The Legislature created the Regional Jail and Prison Authority (now Regional Jail and Correctional Facility Authority) to provide a mechanism by which the problems of both prisons and jails could be addressed. Stipulations, ¶ 4. R. 1173. Placing a priority upon the development of regional jails, the Legislature set out to provide "a cost-efficient system within this state for the construction, maintenance and operation of adult jails and correctional facilities." *W. Va. Code* § 31-20-1(b)(1) (2006).

In all, ten regional jails have been built across the state. See, Fiscal Year 2007 Executive Budget. Construction of the new facilities was financed by state bonds, so as to avoid the imposition of an additional burden upon the counties. The bonds, along with the administrative expenses, are financed by a regional jail fee that is chiefly derived from assessments upon convicted offenders. Stipulation, ¶ 5. R. 1173.

Under the regional jail system, the counties receive new modern jail facilities, which meet or exceed all state and federal minimum jail standards, without the cost of construction or administration. Nevertheless, in just the same manner as before the regional jail system, the counties remain ultimately responsible for the care and upkeep of their inmates. The Legislature incorporated the traditional model by requiring that the operations costs associated with housing inmates continue to be borne by the counties, as well as those other agencies that incarcerate inmates in the system. *W. Va. Code* § 31-20-10(h) (2006).

The *per diem* rate set by the Regional Jail Authority has been held at a relatively low amount. However, under the circuit court's formula, the rate would not only be difficult to fix but would be unduly influenced by DOC backlogs. As this Court has noted in *State ex rel. Sams v. Kirby*, 208 W. Va. 726, 542 S.E.2d 889 (2000) (*Sams I*) and *State ex rel. Sams v. Commissioner, WVDOC*, 218 W. Va. 572, 625 S.E.2d 334 (2005) (*Sams II*), the DOC leases beds in the Regional Jail system. In *Sams I*, this Court directed the development of a long-range plan to move DOC inmates from the Regional Jails to DOC facilities. In *Sams II*, this Court noted that "as of August 2005 the backlog of prisoners being housed in regional jails awaiting transfer to DOC facilities is 1511." *Sams II*, 218 W. Va. at 575, 625 S.E.2d at 337. To facilitate the implementation of the long-range plan, the DOC currently houses between one thousand one hundred (1,100) and one thousand three hundred (1,300) inmates in the Regional Jail Authority facilities. As a result of the DOC backlog, the denominator in the equation urged by the circuit court is artificially inflated and the corresponding *per diem* rate artificially low. The circuit court's formula would eliminate all predictability from the system. It would also allow the rate to be influenced by a factor that is in the process of being drastically reduced or even eliminated.

The statute, as promulgated in 1985, established a governing board for the Authority consisting of the Commissioner of the Department of Corrections, the Commissioner of the Department of Finance and Administration (or designated representative), three (3) members appointed by the Governor (representing law, medicine and county government), the State Superintendent of Schools (or designated representative), the State Fire Marshall (or designated representative), the Director of the Department of Health (or designated representative), and representative of the Juvenile Facilities Review Panel. *W. Va. Code* § 31-20-5 (1985)

In addition, the Legislature created Regional Jail Commissions for each region delineated by the Authority. *W. Va. Code* § 31-20-6 (1985). These Regional Jail Commissions provided for local input into the process of creating regional jail facilities and were comprised of the Sheriffs (or designated representative) of each county within the region, a member from each county commission (or designated representative) within the region, one (1) mayor from each county in the region, and three (3) representatives from the region (representing law, medicine and education). *W. Va. Code* § 31-20-6 (1985). The Regional Jail Commissions were authorized to make recommendations to the Authority as to the facilities and needs of the region. *W. Va. Code* § 31-20-7 (1985). A representative of each such Regional Jail Commission also served as a member of the governing board of the Authority. *W. Va. Code* § 31-20-3 (1985). Thus, the governing board of the Authority could consist of as few as nine (9) and as many as nineteen (19) members. A majority of the board members constituted a quorum, unless the bylaws required a larger number. *W. Va. Code* § 31-20-4 (1985).

By definition a regional jail is "any facility operated by the authority and used jointly by two or more counties for the confinement, custody, supervision or control of persons convicted of misdemeanors or awaiting trial or awaiting transportation to a state correctional facility." *W. Va. Code* § 31-20-2(n) (2006). As originally enacted in 1985, the statute further provided that, after a regional jail facility became available, "each county within the region shall incarcerate all persons whom the county would have incarcerated in any jail prior to the availability of the regional jail facility in the regional jail facility" with certain exceptions for holding facilities. *W. Va. Code* § 31-20-10(g) (1985). Subsection (h) of the same provision required that each such county "shall pay into the regional jail and prison facility development fund a cost per day for each inmate so incarcerated to be determined by the regional jail and prison authority according

to criteria and by procedures established by regulations pursuant to article three, chapter twenty-nine-a of this code to cover the costs of operating such regional jail facility to maintain each such inmate which costs shall not include the cost of construction, acquisition or renovation of said regional jail facility." *W. Va. Code* § 31-20-10(h) (1985). (Emphasis added).

In 1989, the West Virginia Legislature added a section delineating the findings and purposes behind the Act. *W. Va. Code* § 31-20-1a (1989). In addition, the name of the Authority was changed to the West Virginia Regional Jail and Correction Facility Authority. *W. Va. Code* § 31-20-3 (1989). The governing board of the Authority was changed to seven (7) members, including the Commissioner of the Department of Corrections, the Commissioner of the Department of Finance and Administration (of designated representative), three (3) county officials appointed by the Governor (with no more than 2 from the same political party), and two (2) members appointed by the Governor (representing law and medicine). *Id.* A majority of the members still constituted a quorum, unless the bylaws required a larger number. *W. Va. Code* § 31-20-4 (1989).

In 1993, the Legislature amended *W. Va. Code* § 31-20-10(h) to read as follows:

When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility development fund a cost per day for each inmate so incarcerated to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by regulations pursuant to article three, chapter twenty-nine-a of this code to cover the costs of operating the regional jail facilities of this state to maintain each such inmate which costs shall not include the cost of construction, acquisition or renovation of said regional jail facilities: Provided, That each regional jail facility operating in this state shall keep a record of the date and time of the incarceration of an inmate, and a county may not be charged for a second day of incarceration of an individual inmate until that inmate has remained incarcerated for more than twenty-four hours. Thereafter, in cases of continuous incarceration, subsequent per diem charges shall be made upon a county only as subsequent intervals of twenty-four hours pass from the original time of incarceration.

W. Va. Code § 31-20-10(h) (1993). (Emphasis added).

In 1998, the governing board was changed to nine (9) members, “seven of whom are entitled to vote on matter coming before the authority.” *W. Va. Code* § 31-20-3 (1998). The Commissioner of the Division of Corrections and the Director of the Division of Juvenile Services are members of the governing board but are “not entitled to vote on matters coming before the authority.” *Id.* The voting members are the Secretary of the Department of Military Affairs and Public Safety, the Secretary of the Department of Administration, “or his or her designated representative,” three (3) county officials appointed by the governor, and two (2) citizens appointed by the governor to represent law and medicine. *Id.* The quorum requirement remained the same.

W. Va. Code § 31-20-10(h) was also amended to read:

When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility development fund a cost per day for **each incarcerated inmate to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code to cover the costs of operating the regional jail facilities of this state to maintain each inmate.** The **per diem costs for incarcerating inmates** may not include the cost of construction, acquisition or renovation of **the** regional jail facilities: *Provided*, That each regional jail facility operating in this state shall keep a record of the date and time that an inmate is incarcerated, and a county may not be charged for a second day of incarceration for an individual inmate until that inmate has remained incarcerated for more than twenty-four hours. Thereafter, in cases of continuous incarceration, subsequent per diem charges shall be made upon a county only as subsequent intervals of twenty-four hours pass from the original time of incarceration.

W. Va. Code § 31-20-10(h) (1998). (Emphasis added).

In 2001, the Legislature changed the name of the fund from the “regional jail and correctional facility development fund” to “regional jail and correctional facility *authority* fund.”

W. Va. Code § 31-20-10(h) (2001). In 2004, the Legislature amended § 31-20-10(h) as follows:

When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the Regional Jail and Correctional Facility Development Fund a cost per day for each incarcerated inmate to be determined by the Regional Jail and Correctional Facility Authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate.

W. Va. Code § 31-20-10(h) (2006). (Emphasis added).²

In 2005, the Legislature created the Regional Jails Operations Partial Reimbursement Fund. *W. Va. Code § 31-20-10b (2006).* Pursuant to the statute, the State Treasurer is to establish a fund in which to deposit monies generated by fees charged by magistrate courts pursuant to *W. Va. Code § 50-3-2 (2006)* and by the circuit court clerks pursuant to *W. Va. Code § 59-1-11 (2006)*.³ The funds “shall be used to reimburse those counties and municipalities participating in the regional jail system for the cost of incarceration.” *W. Va. Code § 31-20-10b(c).* The State Treasurer distributes the proceeds from the Fund to the counties based upon a pro rata share formula each year within ninety (90) days after July 1. *W. Va. Code § 31-20-10b(d) and (f).* According to the FY2006 report, Cabell County had the third highest total of

² The Legislature also added *W. Va. Code § 31-20-10a*, which provided that: The authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail. The authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year. *W. Va. Code § 31-20-10a(b)(1) (2006).* This section also provides for surcharge to the “cost per inmate day” when the actual operational costs of any line item exceeds the approved schedule by more than ten percent. *W. Va. Code § 31-20-10a(b)(2) (2006).*

The section also sets the parameters for when the counties and the Division of Corrections are responsible for the costs of certain inmates, *W. Va. Code §§ 31-20-10a(c) – (g) (2006)*, and directs that other jurisdictions be responsible for the costs of certain inmates. *W. Va. Code §§ 31-20-10a(h) and (i) (2006).*

³ On March 18, 2007, by Senate Bill 414, the 2007 Legislature amended *W. Va. Code § 59-1-11*. The amendments are to take effect ninety (90) days from date of passage.

inmate days billed and received Two Hundred Forty-Nine Thousand Five Hundred Thirty-Two Dollars and Forty-One Cents (\$249,532.41) from the Partial Reimbursement Fund.

<http://www.wvsto.com/NR/rdonlyres/CA56603E-D0D7-45CA-8918->

[A524C3F4BB2A/0/Regional Jail Fund August 2006.pdf](#)

The Cabell County Commission recently voted to give its Deputy Sheriffs a \$3,000.00 per year pay raise. While the Deputy Sheriffs were most likely deserving of a pay raise, the method chosen by the Cabell County Commission to pay for these raises is cause for concern. The Commission specifically tied the pay raises to a reduction in the regional jail budget – a vital component of the law enforcement system. *See*, “Cabell County Budgets for Deputy Raise,” *The Herald-Dispatch (Huntington)*, March 23, 2007, p. 1A.

Despite the comparatively low *per diem* rate, the Cabell County Commission has essentially shirked its responsibility to pay for the care and upkeep of those it detains and jails in the regional jail system. From fiscal year 1998 to fiscal year 2003, the jail budgets for Cabell County increased from \$1,700,000.00 to \$2,100,000.00. *See*, *Stipulations*, ¶ 52. R. 1190. In the fiscal year 2003-2004, even though it operated its old county jail for five (5) months and joined the Regional Jail system for just seven (7) months, Cabell County Commission budgeted \$1,635,839.00 for regional jail fees. *See*, *Stipulations*, ¶ 17. R. 1175. Despite this historical trend, the Cabell County Commission budgeted a mere \$1,089,322.00 for jail fees and expenses for the entire fiscal year 2004-2005. *See*, *Stipulations*, ¶ 17. R. 1175.

The Cabell County Commission is currently in default by approximately \$1,733,484.02, in paying for those arrested and incarcerated by the law enforcement agencies and courts of Cabell County. As discussed in more detail below, this default is a result of a planned,

organized, deliberate, and premeditated effort by Cabell County Commissioners to avoid their constitutional and legal debts.⁴

III. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN NOT ISSUING A WRIT OF MANDAMUS AND ORDERING THE CABELL COUNTY COMMISSION OBLIGATION TO FULFILL ITS CONSTITUTIONAL OBLIGATION AND PAY FOR THE CARE AND MAINTENANCE OF ITS INMATES.
- B. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY COULD ONLY CHARGE THE CABELL COUNTY COMMISSION THE ACTUAL COST OF HOUSING AND MAINTAINING EACH INMATE COMMITTED TO THE WESTERN REGIONAL JAIL BY THE APPROPRIATE AUTHORITIES OF CABELL COUNTY, WEST VIRGINIA.
- C. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY WAS WITHOUT AUTHORITY TO ENACT AN INCREASE TO THE COST PER INMATE DAY ON FEBRUARY 10, 2004.

IV. DISCUSSION

A. STANDARD OF REVIEW.

For Writ of Mandamus to issue, three elements must co-exist. A “(1) clear legal right in the Petitioner to the relief sought; (2) a legal duty on the part of the Respondent to do the thing which the Petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

“The standard of appellate review of a circuit court’s order granting relief through the extraordinary writ of mandamus is *de novo*.” Syl. Pt. 1, *Ewing v. Board of Education*, 202 W. Va. 228, 503 S.E.2d 541 (1998). (Citations omitted). “Where an issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de*

⁴ Currently, the accounts receivable balance for the Regional Jail Authority is reaching a new high. For fiscal year 2006, the balance is \$6,843,272.02. For fiscal year 2007, the balance is \$21,301,278.59, for a total of approximately \$28,144,551.61.

novo standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

As noted in the following sections, this Honorable Court should reverse the Final Order of the Circuit of Cabell County, West Virginia, as the Regional Jail Authority has a clear legal right to collect and the Cabell County Commission has a clear duty to pay the fees assessed by the Regional Jail Authority.

B. THE CIRCUIT COURT ERRED IN NOT ISSUING A WRIT OF MANDAMUS AND ORDERING THE CABELL COUNTY COMMISSION OBLIGATION TO FULFILL ITS CONSTITUTIONAL OBLIGATION AND PAY FOR THE CARE AND MAINTENANCE OF ITS INMATES.

As noted above, this proceeding originated in this Court on the Regional Jail Authority’s Petition for Writ of Mandamus. This Court issued a rule returnable to the Circuit Court of Cabell County, West Virginia. Although not mentioning the relief in the language of mandamus, the circuit court ordered the respondent, Cabell County Commission, to pay the Regional Jail Authority in accordance with the findings and conclusions. In its findings and conclusions, the circuit court concluded, among other things, that it could not issue a writ of mandamus to the Cabell County Commission to exercise its budgetary authority and pay for the care and maintenance of its inmates. The circuit court failed to acknowledge that the obligation to care and maintain these inmates is constitutional and, therefore, must be paid before other statutory and contractual obligations.

With respect to this particular assignment of error, the circuit court erred in its interpretation of the legal underpinnings of the Cabell County Commission’s obligation to pay for the care and maintenance of its inmates. In this respect, the Regional Jail Authority is challenging the legal rulings of the circuit court.

The circuit court, "reaffirming" its prior ruling in *Chiles v. Bailey*, Civil Action No. 05-C-162, concluded that the Cabell County Commission must fund its obligations pursuant to a three-tiered formula. In this respect, the circuit court found that:

[U]nder circumstances where a county has exhausted its constitutional and statutory revenue sources, but has insufficient funds to finance all of its constitutional, statutory, and contractual obligations, a county must first fully fund all of its constitutional obligations and, thereafter, if additional funds remain, fund so much of its statutory obligations as possible and, thereafter, if additional funds remain, fund so much of its contractual obligations as possible.

Final Order, Conclusion of Law 32, at p. 12. R. 1227.

"Expenditures by a county court, from the general county fund, necessary to administer constitutionally required functions of county government, are mandatory, and take precedence over those required for general relief." Syl. Pt. 2, *Kenny v. Webster County Court*, 124 W. Va. 519, 21 S.E.2d 385 (1942). The care and maintenance of inmates is a constitutionally required function of the county government. County Commissions have the constitutional authority to administer the police and fiscal affairs of their counties. *W. Va. Const.*, Article IX, § 11.

It is axiomatic that both the West Virginia Constitution and the United States Constitution require minimum standards of care and treatment for pretrial detainees and inmates. "Once a state legitimately deprives a person of his liberty, it is required to shoulder the economic burden necessary to preserve the constitutional rights retained by the person within the walls of the jail or prison." *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W. Va. 1981). (Citations omitted). The Eighth and Fourteenth Amendments to the United States Constitution have been consistently interpreted to require certain minimum standards of treatment. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978); and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979).

Moreover, in commenting on the conditions at the Mercer County jail, the United States District Court for the Southern District of West Virginia observed in *Dawson* that the state statutes governing the creation and maintenance of jails "may give rise to liberty and property interests secured to county prisoners by the Fourteenth Amendment to the United States Constitution." *Dawson*, 527 F.Supp. at 1284. (Citations omitted).

This Court has noted that "[c]ertain conditions of ... confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution [and Article III, Section 5 of the West Virginia Constitution]." Syl. pt. 2, *Hickson v. Kellison*, 170 W. Va. 732, 296 S.E.2d 855 (1982).

"[I]n determining the powers of the county court [now County Commission]," one "must look to the constitution, which created that body, and to the laws which were enacted by the legislature pursuant to the constitutional provisions." *State ex rel. County Commission of Cabell Co. v. Arthur*, 150 W. Va. 293, 296, 145 S.E.2d 34, 36 (1965). The care and maintenance of inmates is necessary to give full effect to the authority of the other constitutional officers of the counties. These other constitutional officers include the circuit courts [*W. Va. Const.*, Article VIII, § 5], the magistrate courts [*W. Va. Const.*, Article VIII, § 10], Prosecuting Attorneys [*W. Va. Const.*, Article IX, § 1], and Sheriffs [*W. Va. Const.*, Article IX, § 1]. *W. Va. Code* § 31-20-10 was enacted to provide for the support of the local authorities and their police powers. Without the provision of constitutionally sufficient jails and correctional facilities, the law enforcement activities and orders of these officials would have little effect. Thus, the obligation of the counties to pay the *per diem* rate for care and maintenance of the inmates they place in the regional jail system should be treated as much more than a statutory obligation.

In the Final Order, the circuit court ordered that "the Commission is liable to the Jail Authority for the per diem charges as adjusted." Final Order, at p. 13. By omission, however, the circuit court declined to issue the writ of mandamus, concluding that "in the absence of arbitrary action, this Court lacks authority to order the Commission to exercise its budgetary powers in any particular manner." Final Order, Conclusion of Law 30, at p. 11.

Yet, the record clearly demonstrates that the Cabell County Commission acted arbitrarily in adopting a budget that reduced its anticipated outlay for care and upkeep of inmates by more than fifty percent (50%). Not only is the county constitutionally obligated to care for and maintain those individuals that it incarcerates, but the failure to budget monies for this purpose jeopardizes the ability of the various constitutional officers of Cabell County to perform their constitutional obligations. *See, e.g., State ex rel. Bd. of Educ. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981).

In *Rockefeller*, this Court held that:

1. The provisions of Article XII, Section 1 et seq., as well as Article X, Section 5 of the West Virginia Constitution, when construed in the light of our prior cases, gives a constitutionally preferred status to public education in this State.
2. Because of public education's constitutionally preferred status in this State, expenditures for public education cannot be reduced under W. Va. Code, 5A-2-23, in the absence of a compelling factual record to demonstrate the necessity therefor.

Syl. pts. 1 and 2, *Rockefeller*. In *Rockefeller*, this Court determined that mandamus was an appropriate remedy to prevent the Governor from reducing the monies budgeted for education.

The same rationale applies to the instant situation.

The police power of the counties is a constitutional priority. In addition, the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article III, Sections 5 and 10 of the West Virginia Constitution, place a constitutional premium on certain minimum

conditions of confinement in the jails and prisons. For these reasons, a county commission must treat the obligation to pay for the care and maintenance of inmates in much the same manner as it does the budgets for prosecuting attorneys, circuit court clerks and county sheriffs.

The Cabell County Commission is currently in default by approximately \$1,733,484.02, in paying for inmates incarcerated by the Circuit and Magistrate Courts which sit in Cabell County. This default has not been a result of some unforeseeable exigent circumstance. It is not the outcome of some unavoidable chain of events. Rather, this default is a result of a planned, organized, deliberate, and premeditated effort by Cabell County Commissioners to avoid their constitutional and legal debts.

In the fiscal year 2003-2004, even though it operated its old county jail for five (5) months and joined the Regional Jail system for just seven (7) months, Cabell County Commission budgeted \$1,635,839.00 for regional jail fees. See, Stipulations, ¶ 17. R. 1175. In stark contrast, shortly after its officials began making waves about regional jail costs in the media, the Cabell County Commission only budgeted \$1,089,322.00 for the entire fiscal year 2004-2005. See, Stipulations, ¶ 17. R. 1175.

The Cabell County Commission could have easily projected the number of inmates they had incarcerated in past years and calculated approximately what their jail bill would be. Instead, the county commissioners budgeted only fifty percent of what they anticipated the cost would be. In fact, the budget for fiscal year 2004-2005 bears no rational relationship to Cabell County's history of care and upkeep of its inmates. During the time period before the Regional Jail System, Cabell County's jail budgets increased steadily, reaching numbers much higher than the invoices submitted by the Regional Jail System. From fiscal year 1998 to fiscal year 2003,

the jail budgets for Cabell County increased from \$1,700,000.00 to \$2,100,000.00. See, Stipulations, ¶ 52. R. 1190.

This fact, combined with the fact that Cabell County did not make any decreases in the budget for parks and libraries during the relevant periods, clearly evidences a deliberate attempt on the part of the Cabell County Commission to arbitrarily avoid its obligations to care and maintain the inmates that it commits to the Regional Jail system. See, Stipulations, ¶ 53. R. 1190. In fact, in response to the instant petition, the Cabell County Commission failed to come forward with any argument that it lacked sufficient revenues or had other budgetary restrictions or considerations when it enacted the fifty percent (50%) cut in the budget for care and maintenance of inmates. The Cabell County Commission did not justify the initial budgetary decision at all.

The justice system depends upon the efficient provision of the services now administered by the Regional Jail Authority. For the system to work, each county must shoulder its burden to pay for the care and maintenance of its inmates. In the most important aspects, the system has not really changed from the time that the counties had their own jails. The Legislature has merely provided a new and more efficient mechanism for carrying out that obligation. Just because the Legislature changed the recipient of the funds for care and maintenance of inmates, the obligation did not change. The obligation to care for and maintain the inmates is still on the counties. By deliberately withholding the necessary funds to satisfy its obligations to keep and maintain inmates, the Cabell County Commission is openly flaunting the authority of those constitutional officers that it purports to support – its law enforcement and judicial officials.

Sadly, if the Cabell County Commission is permitted to have its way, other counties, many poorer than Cabell County, with Commissioners who take their fiscal responsibility

seriously must ultimately have to pay higher jail costs to subsidize Cabell County's irresponsible behavior.

Based upon the foregoing precedent, the West Virginia Regional Jail Authority is entitled to a writ of mandamus compelling the Cabell County Commission to fully fund its obligations for the care and maintenance of its inmates.

- C. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY COULD ONLY CHARGE THE CABELL COUNTY COMMISSION THE ACTUAL COST OF HOUSING AND MAINTAINING EACH INMATE COMMITTED TO THE WESTERN REGIONAL JAIL BY THE APPROPRIATE AUTHORITIES OF CABELL COUNTY, WEST VIRGINIA.

In the Final Order, the circuit court made the following observation:

7. Since 1998, W. Va. Code § 31-20-10(h) has provided, "When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the regional jail and correctional facility authority fund a cost per day for each incarcerated inmate to be determined by the regional jail and correctional facility authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate. The per diem costs for incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities"

Final Order, Conclusion of Law 7. R. 1219 – 1220. The circuit court went on to discuss the differences between a legislative rule and a procedural rule. Final Order, Conclusions of Law 8 and 9. R. 1220.

The circuit court finally observed that *W. Va.C.S.R. § 94-3-5* was the Regional Jail Authority's rule for calculation of the "cost per inmate day" charges. Final Order, Conclusion of Law 10. R. 1220 – 1221. The circuit court concluded that *W. Va.C.S.R. § 94-3-5* was "adopted as a 'procedural rule,' not a 'legislative rule.'" Final Order, Conclusion of Law 10. R. 1221. However, in 1995, when the rule was promulgated, the statute only required "rules." The circuit

court concluded that, because *W. Va. C.S.R. § 94-3-5* was not promulgated as a legislative rule, it "is invalid." Final Order, Conclusion of Law 12. R. 1221 – 1222.

After finding the Regional Jail Authority's rule to be invalid, the circuit court then engaged in a statutory analysis to determine what cost per inmate day may be properly charged to counties, such as Cabell County. It is this statutory analysis that the Regional Jail Authority takes issue with on appeal.

In this respect, the circuit court erred when it concluded that:

17. The Court concludes that, pursuant to statute, a county is responsible only for the actual operational costs per inmate day at the regional jail for which charges are being assessed.

18. The Court concludes that the Jail Authority must reduce the amount allegedly owed by the Commission from and after July 1, 2004, to \$40.42, the amount stipulated by the parties to be the actual operational cost per inmate day for the Western Regional Jail for fiscal year 2005, for every inmate day charged to the Commission from and after July 1, 2004.

Final Order, Conclusions of Law 6, 17 and 18. R. 1219 and 1223.

After a regional jail facility becomes available to serve a region, every county in the region must incarcerate all persons who would have been incarcerated in the county jail in the regional jail facility. *W. Va. Code § 31-20-10(g)*. See also, *State ex rel. Canterbury v. Mineral County Comm'n*, 207 W. Va. 381, 532 S.E.2d 650 (2000).

The circuit court correctly notes that *W. Va. Code § 31-20-10(h)* requires the county to pay the Regional Jail Authority "a cost per day for each incarcerated inmate . . . to cover the costs of operating the regional jail facilities of this state to maintain each inmate." *W. Va. Code § 31-20-10(h)*. (Emphasis added). However, other than specifying what may not be included in the cost per day for each incarcerated inmate, § 31-20-10 does not yield any more information on how to calculate the applicable charge.

W. Va. Code § 31-20-10a (2006), entitled “Criteria And Procedures For Determining The Cost Per Day For Inmates Incarcerated In Facilities Operated By The Authority And Allocating Cost”, provides some guidance but no formula. That provision of the statute provides the following:

- (b)(1) The authority shall develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail. The authority shall develop and approve an operational expenditure schedule for each regional jail on an annual basis, consistent with the state fiscal year.
- (2) If the actual operational costs exceed the approved schedule of operational expenditures by more than ten percent in a line item, the authority's executive director shall add a temporary surcharge to the cost per inmate day in an amount sufficient to cover the actual expenditures.
- (c) The county is responsible for costs incurred by the authority for housing and maintaining inmates in its facilities who have not been committed to the custody of the commissioner of corrections.
- (d) The county is responsible for the costs incurred by the authority for housing and maintaining inmates who, prior to sentencing, are awaiting transportation to a state correctional facility for a sixty-day evaluation period as provided in section seven, article twelve, chapter sixty-two of this code.

W. Va. Code § 31-20-10a(b) (2006). (Emphasis added).

Although *W. Va. Code* § 31-20-10(h) refers to “cost per day,” *W. Va. Code* § 31-20-10a(b)(2) refers to the “cost per inmate day.” In addition, while *W. Va. Code* § 31-20-10a(b)(1) refers to a “schedule of anticipated operational expenditures for each regional jail,” it does not specify whether the Regional Jail Authority should create a “cost per inmate day” for each regional jail facility or one “cost per inmate day” for all of the facilities. More importantly, while it can be argued that the statute provides the numerator for the calculation (schedule of anticipated operational expenditures), the statute does not specify the denominator for the calculation (total inmate beds vs. anticipated occupancy vs. actual occupancy).

Thus, the statute is susceptible to interpretation. As such, the circuit court should have accorded some deference to the interpretation of the agency charged with enforcement of the statute. "It is by now commonplace that when faced with a problem of statutory construction, the circuit court and this Court should give some deference to the interpretation of the officer who is charged with statutory implementation." *Martin v. Randolph Co. Bd. of Education*, 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995). " " "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." ' ' " *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992). (Citations omitted). See also, Syl. Pt. 2, *W. Va. DHHR/Welch Emergency Hosp. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992); *Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va.*, 179 W. Va. 250, 366 S.E.2d 758 (1988).

The Regional Jail Authority has evidenced its interpretation in the form of *W. Va.C.S.R. § 94-3-5*. *W. Va.C.S.R. § 94-3-5* was properly promulgated in 1995 and represents a valid interpretation of the requirements of *W. Va. Code § 31-20-10* and *§ 31-20-10a*. The Regional Jail Authority has reasonably concluded that it cannot operate its facilities without anticipating revenues and budgeting for anticipated costs. In addition, the Regional Jail Authority has reasonably determined that it would be inefficient to prepare a schedule of anticipated expenditures and then wait for actual occupancy figures to calculate the charge to be assessed for maintenance of each inmate. The Regional Jail Authority has justifiably determined that it would be inequitable to assess different charges for the different facilities across the state. The Regional Jail Authority has also concluded that, to fulfill the goals of the statute, charges to the

counties should be assessed on a monthly basis. All of these interpretations are reasonable and deserve to be accorded some deference by the courts.

The interpretation of the Regional Jail Authority is also consistent with the history of the Act and its amendments. As noted in the Statement of the Case section, above, the Act originally referred to the *per diem* charge as covering the "cost of operating such regional jail facility to maintain each such inmate." *W. Va. Code* § 31-20-10(h) (1985). Yet, the Legislature amended this particulate provision in 1993. The 1993 amendment to the subsection has been retained to this day and provides that the *per diem* charge is to "cover the costs of operating the regional jails of this state to maintain each such inmate." *W. Va. Code* § 31-20-10(h) (1993). (Emphasis added). Thus, while the original statutory language may have supported the circuit court's interpretation of a *per diem* rate that is unique to the regional jail in which each county houses its inmates, the language since 1993 has been consistent with the Regional Jail Authority's system of having a uniform rate for all of the regional jails in the state based upon anticipated costs.

In addition, the process set forth by the circuit court runs contrary to the Legislature's pronouncement that the schedule of anticipated operational expenditures have some relationship to the "cost per inmate day." Such schedules would be meaningless in the system envisioned by the circuit court, as the Authority would have to wait for actual expenditures to be calculated to set a rate and charge the various entities that incarcerated individuals in the system.⁵ What's more, under this system the counties will have no opportunity to accurately budget, as the Authority will not be able to set the rate until the end of the fiscal year.

⁵ The only reason that the parties were able to calculate the actual costs for the circuit court in this case is that the issue did not reach the court until after the fiscal year had ended. However, waiting until the end of a fiscal year to assess each county and then waiting the attendant amount of time to receive reimbursement will likely bankrupt the system in a rapid fashion.

The circuit court's determination that "a county is responsible only for the actual operational costs per inmate day at the regional jail for which charges are being assessed" is a completely unworkable proposition. Such a process would require the Regional Jail Authority to "carry" the costs of incarceration for a period of time (most likely a year) and then perform a forensic calculation of the actual costs – all before the Regional Jail Authority would be permitted to issue a bill for the incarceration. The carrying time would most likely extend to at least a year to allow for totaling of annual expenditures and calculation of annual occupancy rates. Not only would this require initial operating capital that the Authority does not have, but it would fly in the face of the statutory scheme that requires the State to utilize bonds to cover the costs of constructing the facilities but requires the counties to bear the costs of housing and maintaining the inmates.

The system developed by the Authority and reflected in *W. Va.C.S.R. § 94-3-5* is abundantly more reasonable. The Authority prepares the anticipated expenditures schedules, determines a reasonable rate of occupancy based upon past experience or, where not available, a reasonable percentage. Then the authority sets a uniform rate per inmate day for use for the upcoming fiscal year and advertises the same to the fifty-five (55) counties across the State. Those counties, in turn, are able to look at their past incarceration rates and calculate an anticipated cost for incarcerating inmates for the upcoming fiscal year.

The circuit court incorrectly interpreted the statute at issue and failed to give due deference to the statutory interpretation of the Regional Jail Authority. The Regional Jail Authority utilizes a reasonable process for calculating the "cost per inmate day" to be charged to the various counties that is also in tune with the legislative intent. In the absence of legislative pronouncement to the contrary, that interpretation and the past decisions of the Regional Jail

Authority in conformity with that interpretation should be ratified and enforced by this Court. For these reasons, this Honorable Court should reverse the decision of the Circuit Court of Cabell County and issue the Writ of Mandamus ordering the Cabell County Commission to fulfill its obligations and pay the invoices as issued.

D. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY WAS WITHOUT AUTHORITY TO ENACT AN INCREASE TO THE COST PER INMATE DAY ON FEBRUARY 10, 2004.

In the Final Order, the circuit court made several findings of fact and conclusions of law regarding a meeting held by the West Virginia Regional Jail and Correctional Facility Authority on February 10, 2004. During that meeting a vote was taken to increase in the *per diem* rate from \$45.00 to \$48.50. For two (2) very different reasons, the circuit court found, in effect, that two (2) voting members of the Regional Jail Authority Board were not present at the meeting and, therefore, no quorum existed. For the following reasons, the Regional Jail Authority prays this Honorable Court reverse these findings and conclusions by the circuit court.

The circuit court found that "the only voting members of the Jail Authority who attended the meeting of February 10, 2004, were Christy Morris and Glen Stotler as (i) Dan Huck participated by telephone; (ii) Tom Susman did not attend and voted by proxy; (iii) Willie Akers was absent; (iv) Tennis Hatfield was absent; and (vii) [sic] John Walden was absent." Final Order, Finding of Fact 8. R. 1217. Therefore, the circuit court found as a matter of law that "the Jail Authority lacked a quorum at its meeting on February 10, 2004" and voided the increase in the *per diem* rate that was instituted at that meeting. Final Order, Conclusion of Law 6. R. 1219.

The Regional Jail Authority takes issue with these findings on the grounds that: (1) no statute or procedural regulation prohibited the presence of Board members by telephone; and (2) no statute or procedural regulation requires written evidence of the appointment of a designated

representative for a Board member. In fact, the circuit court did not find as a matter of law that members of the Board were prohibited from appearing by telephone or that the Secretary of the Department of Administration was prohibited from designating a representative to appear at meetings on his or her behalf.

With respect to the requirements for a quorum to conduct business, the relevant statute provides that:

(a) The governing body of the authority shall consist of the voting members of the board as provided for in section three [§ 31-20-3] of this article and shall exercise all the powers given to the authority in this article. On the second Monday of July or each odd-numbered year, the board shall meet to elect a chairman and a secretary from among its own members. The secretary of the department of administration or his or her designated representative shall serve as treasurer of the board. The board shall otherwise meet quarterly, unless a special meeting is called by its chairman.

(b) A majority of the members of the board constitute a quorum, and a quorum must be present for the board to conduct business. Unless the bylaws require a larger number, action may be taken by majority vote of the members present.

W. Va. Code § 31-20-4(a) and (b) (2006). (Emphasis added). The applicable procedural rule adopted by the Regional Jail Authority provides that:

A majority of the members of the Board shall constitute a quorum. The affirmative vote of a majority of all members present at any meeting shall be sufficient to approve any action. Proxy voting is hereby prohibited; duly qualified members of the Board, or their designee as provided by W. Va. Code § 31-20-3, are permitted to vote.

W. Va. C.S.R. § 94-1-8.1. (Emphasis added).

The parties stipulated that, at the time of the February 10, 2004 meeting, the “seven voting members” of the Authority were Willie Akers, Tom Susman, Tennis Hatfield, Dan Huck, Christy Morris, Glen Stotler, and John Walden. Stipulations, ¶ 41. R. 1186. Of the nine (9) members of the Board, the minutes of the February 10, 2004 meeting indicate that six (6) were present. Stipulations, ¶ 41. R. 1186. Of these six (6), four (4) were voting members.

Stipulations, ¶ 41. R. 1186. According to the minutes, Donna Lipscomb appeared on behalf of Mr. Susman, the Secretary of the Department of Administration. Final Order, Finding of Fact 7. R. 1217. The minutes from the meeting further reflected that the Chairman of the Board, Dan Huck, appeared “via conference call.” Stipulations, ¶ 41. R. 1186.

The first person found to be absent by operation of law by the circuit court was Dan Huck. Mr. Huck was a voting member of the Board. However, the circuit court found that “Jail Authority member Dan Huck participated and voted by telephone in a meeting conducted on February 10, 2004.” Final Order, Finding of Fact 2. R. 1217. The circuit court found as fact that “no evidence [was presented] that the Jail Authority had adopted any rules or regulations permitting members to attend Jail Authority meetings by telephone.” Final Order, Finding of Fact 3. R. 1217.

At the time of the February 10, 2004 meeting, nothing in the statutes or regulations governing the conduct of the business of the Board prohibited appearance by telephone at Board meetings. Simply put, there is no legal or logical reason that Chairman Huck could not appear by telephone. The statute merely requires that a quorum be “present.” *W. Va. Code* § 31-20-4(b).

Where the statute is plain and unambiguous, the courts are not to resort to interpretation. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Martin*, 195 W. Va. at 312, 465 S.E.2d at 414, *quoting, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149 (1992). “Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” Syl. Pt. 3, *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 624

S.E.2d 729 (2005), *quoting*, Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).

In the instant case, the statute is plain and unambiguous. A quorum is present when a majority of the members of the Board are "present." Chairman Huck was "present." *Black's Law Dictionary* defines "present" as "[n]ow existing." *Black's Law Dictionary*, 6th Ed. (1991). Chairman Huck was certainly in existence at the February 10, 2004 meeting. The circuit court, in essence, removed the word "present" and added a requirement that members appear "in person." The circuit court had no authority for adding language to the statute or the procedural rules of the Regional Jail Authority.

In addition, the circuit court's interpretation mutes out the words, "meet" and "meeting," from *W. Va. Code* § 31-20-4(a) and *W. Va. C.S.R.* § 94-1-8.1. These terms are not defined in the Regional Jail Authority Act but are defined elsewhere in the West Virginia Code. In particular, *W. Va. Code* § 6-9A-1, *et seq.* (2006), the West Virginia Open Governmental Proceedings Act, defines what constitutes a "meeting" for public agencies in the State of West Virginia. The OPGA specifically provides, in pertinent part, that a "[m]eeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. *W. Va. Code* § 6-9A-2(4) (2006). (Emphasis added).

Thus, the chairman, Mr. Huck, was properly present at the February 10, 2004 meeting. His participation by telephone was not prohibited by any specific statute or rule. His participation by telephone was authorized by the general provisions of the West Virginia Open Governmental Proceedings Act.

The second person the circuit court deemed to be absent from the February 10, 2004 meeting by operation of law was Tom Susman. Mr. Susman was the Secretary of the Department of Administration and a voting member of the Board. The circuit court found that Mr. Susman "did not attend" the meeting but "voted by proxy." Final Order, Finding of Fact 4. R. 1217. In so finding, the circuit court necessarily acknowledged the fact that Donna Lipscomb appeared on behalf of Mr. Sussman. The circuit court further found that "no evidence has been presented that Mr. Susman had officially appointed Ms. Lipscomb as his Jail Authority designee prior to the meeting of February 10, 2004." Final Order, Finding of Fact 6. R. 1217.

W. Va. Code § 31-20-3 (2006) provides, in pertinent part:

The authority shall be governed by a board of nine members, seven of whom are entitled to vote on matters coming before the authority. The complete governing board shall consist of the commissioner of the division of corrections; the director of the division of juvenile services; the secretary of the department of military affairs and public safety; the secretary of the department of administration, or his or her designated representative; three county officials appointed by the governor, no more than two of which may be of the same political party; and two citizens appointed by the governor to represent the areas of law and medicine. The commissioner of the division of corrections and the director of the division of juvenile services shall serve in an advisory capacity and are not entitled to vote on matters coming before the authority. Members of the Legislature are not eligible to serve on the board.

W. Va. Code § 31-20-3 (2006). (Emphasis added). By its very terms, the statute provides that the Secretary of the Department of Administration, a voting member of the governing board, may designate a representative to appear and vote on his or her behalf.

Just like the appearance of Mr. Huck, the statute is plain and unambiguous as to the participation of Mr. Susman by his designated representative. While the statute clearly permits Mr. Susman "or his or her designated representative" to appear and participate in all Board meetings, the statute does not require any specific form of designation. The circuit court, again, inserts language into a plain and unambiguous statute. Neither the statute nor the procedural

rules of the Regional Jail Authority require a written or otherwise "official" designation by the Department of Administration. So long as the Secretary appears by designee, the quorum call is satisfied. In this case, the circuit court also elevates form over substance.

Although the minutes of the meeting incorrectly identify that the Department of Administration was represented by proxy, the Department of Administration was represented by designated representative. To the extent that *W. Va.C.S.R.* § 94-1-8.1 prohibited voting by proxy, it also permitted voting by designee. The result is a distinction without a difference.⁶ While other members of the Board are prohibited from voting by proxy, the statute clearly permits the Secretary of the Department of Administration to participate and vote by a designee.

Ms. Lipscomb, as the designated representative of the Department of Administration, had full authority to vote pursuant to her designation. The circuit court failed to acknowledge the statutory distinction between the Secretary of the Department of Administration and the other voting members of the Board. While the other voting members of the Board are prohibited from voting by proxy or appearing by designee, the Secretary of the Department of Administration is statutorily authorized to appear by designated representative. The net effect of the circuit court's ruling is to strip Mr. Susman of his statutory right to appoint a representative to appear on his behalf. Whether denominated as a proxy or a designee, the unavoidable conclusion is that Ms. Lipscomb was appearing on behalf of Mr. Susman, the only voting member of the Board statutorily authorized to designate another individual to appear on his behalf.

Therefore, applying the statutorily defined quorum analysis, a majority of the members of the Board were present on February 10, 2004. Six (6) of the nine (9) attended, either by in

⁶ "Proxy" has been defined as "[a] person who is substituted or deputed by another to represent him and act for him, particularly in some meeting or public body. An agent representing and acting for principal. Also the instrument containing the appointment of such person." *Black's Law Dictionary*, 6th Ed. (1991).

person, by phone or by designated representative. Of the six (6) present, four (4) were voting members. The vote taken on the rate increase was three (3) to one (1) in favor of the increase. Stipulations, ¶ 41. R. 1186.⁷ As such, the quorum and majority voting requirements were satisfied and the increase in the *per diem* rate to \$48.50 was both proper and legal.

For the foregoing reasons, the Regional Jail Authority prays this Honorable Court reverse the rulings of the Circuit Court of Cabell County, West Virginia. In particular, the Regional Jail Authority seeks reversal of the conclusions of the circuit court that found, as a matter of law, that members Huck and Susman could not participate in meetings by telephone or other electronic means and could not participate by designee.

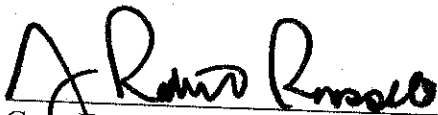
V. CONCLUSION

The necessity for reversal of the Final Order entered by the Circuit Court of Cabell County, West Virginia on May 15, 2006 and issuance of the requested Writ of Mandamus is apparent. The circuit court erred in demoting the obligations of care and treatment of inmates to discretionary budgetary status. The circuit court further erred in interpreting the statutes governing the "cost per inmate day" calculations. The circuit court failed to accord any deference or weight to the reasonable interpretation of the statutes by the West Virginia Regional Jail and Correctional Facility Authority. Finally, the circuit court erred in imposing extra-statutory requirements regarding the participation of members of the Board of the Authority in meetings and votes of the Board.

⁷ The minutes indicate that Mr. Susman voted "by proxy" (Ms. Lipscomb). Stipulations, ¶ 41. R. 1186. Final Order, Findings of Fact 4 and 7. R. 1217. This appears to be a misnomer, as Ms. Lipscomb appeared by designation and had every authority to vote in that capacity. The use of the word "proxy" in the minutes is an unfortunate misstatement. By statute, one (1) and only one (1) Board member is permitted to appear by designation – the Secretary of the Department of Administration. *W. Va. Code* § 31-20-3. While other members may be prohibited from voting by proxy, the Secretary of the Department of Administration is specifically authorized to send a representative to vote in his or her stead.

There is no denying the uniqueness of the question before this Court. There is no real precedent for the cost-sharing approach to Regional Jails that is represented in *W. Va. Code* § 31-20-1, *et seq.* However, the underlying constitutional nature of the system and the legislative intent is clear. Counties, such as Cabell County, are responsible for the daily costs of housing their inmates. It was this way prior to the opening of the regional jail when the county operated its own county jail. It remains that way today. The obligation is clear. The West Virginia Regional Jail and Correctional Facility Authority has a clear legal right to be paid and the Cabell County Commission has a clear constitutional duty to pay for the care and maintenance of inmates committed by the various authorities of Cabell County. The West Virginia Regional Jail and Correctional Facility Authority is entitled to a Writ of Mandamus ordering the Cabell County Commission to fulfill its obligations and immediately remit payment to the Authority.

STATE EX REL. WEST VIRGINIA
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY,
By Counsel,



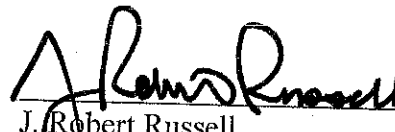
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CERTIFICATE OF SERVICE

I, J. Robert Russell, hereby certify that I have this 7th day of May, 2007, given notice of the filing of the foregoing "Brief of Appellant" by delivering a true copy thereof, by hand, to counsel for the Appellees as follows:

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A handwritten signature in black ink, appearing to read "J. Robert Russell", is written over a horizontal line.

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